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No.

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In The

Supreme Court of the United States

October Term, 1992

FREDERICK WILLIAM REYNOLDS, JR.,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A prosecutor advised the petitioner to seek counseling, knowing that any incriminating information the petitioner gave the counselor would be turned over to the police. Was the petitioner's subsequent confession to the police as part of the therapeutic process involuntary under the Fourteenth Amendment?

2. Did an unwarned interrogation by police at the petitioner's home for the purpose of obtaining a corroborating confession violate the petitioner's Fifth Amendment rights? If it did not, was his confession nevertheless involuntary under the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
How the Federal Question Was Presented	7
Reasons for Granting the Writ	9
I. The prosecutor failed to warn petitioner adequately once she advised him to seek counseling.	9
II. A. The petitioner should have been given a *Miranda* warning before the interrogation at his home.	12
B. The petitioner's second confession was involuntary under the Fourteenth Amendment.	15
Conclusion	17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976) 10, 13, 14

Berkemer v. McCarty, 468 U.S. 420, 102 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) 12, 13, 14, 15

Bryant v. State, 49 Md. App. 272, 431 A.2d 714 (1981) 17

Chambers v. Florida, 309 U.S. 227 17

Colorado v. Spring, 479 U.S. 564, 10 S. Ct. 851, 93 L. Ed. 2d 954 (1987) 10, 11, 16

Lynum v. Illinois, 372 U.S. 564, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963) 11

Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968) 14

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 682 (1966) 5, 8, 10, 12, 13, 14, 15, 16, 17

New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) 14

Contents

Page

Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) 16

Oregon v. Mathiason, 429 U.S. 477, 97 S. Ct. 711, 50 L. Ed. 2d 701 (1977) 12

Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969) 13, 14

Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) 14

Spano v. New York, 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) 11

United States v. Mandujano, 425 U.S. 564, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (1976) 10

Statutes Cited:

28 U.S.C. § 1257 2

Md. Code Ann. Family Law § 5-704(a)(1)(i) 4

United States Constitution Cited:

Fifth Amendment .....i, 2, 7

Fourteenth Amendment .....i, 3, 7, 15

Contents

Page

Rule Cited:

Maryland Rule of Professional Conduct 3.8: Special Responsibilities of a Prosecutor and the ABA Standards of Criminal Justice Relating to Prosecution Function 11

APPENDIX

Appendix A — Opinion of the Court of Appeals of Maryland Filed August 24, 1992 ..... 1a

Appendix B — Opinion of the Court of Special Appeals of Maryland Filed August 29, 1991 ..... 22a

Appendix C — Opinion of the Circuit Court for Carroll County, Maryland, February 27, 1990 ..... 49a

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FREDERICK WILLIAM REYNOLDS, JR.,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

The petitioner Frederick William Reynolds, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland, entered in the above-entitled proceeding on August 24, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 327 Md. 486, 610 A.2d 782 (1992) and is reprinted in the appendix hereto, p. 1a, *infra.*

The opinion of the Court of Special Appeals of Maryland is reported at 88 Md. App. 197, 594 A.2d 609 (1991) and is reprinted in the appendix hereto, p. 22a, *infra.*

The bench opinion of the Circuit Court for Carroll County, Maryland is reprinted in the appendix hereto, p. 49a, *infra.*

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of Maryland was entered August 24, 1992, affirming the decision of the Court of Special Appeals of Maryland entered August 29, 1991 which had in turn affirmed petitioner's conviction by the Circuit Court for Carroll County, Maryland on June 5, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Frederick William Reynolds, Jr., a farmer with a twelfth grade education, went to the Family Children's Service Center, in Carroll County, Maryland to receive counseling. He had been referred there by his minister from whom he had previously received counseling after two of Reynolds' adult daughters told the rest of the family that Reynolds had sexually abused them during their childhood. There was no evidence that this behavior had been repeated for the past twelve years.

When Reynolds arrived at the Family Children's Service Center, he was asked to sign a waiver form that stated that any information he disclosed during treatment might be turned over to the police. The counselor explained that it was important for Reynolds to be very honest with his therapists in order for them to help him (R. M-80). Reynolds was also told that if he did not sign the waiver, he could not receive counseling (R. M-101; M-102-103).[1]

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1. A Maryland statute provides, in pertinent part, that:

(Cont'd)

Reynolds was worried about signing the waiver form, but "desperate" for counseling (R. M-100). He therefore telephoned a prosecutor at the local State's Attorney's Office, the same prosecutor who subsequently prosecuted him in his criminal trial. He explained to her that his counselor wanted him to sign a waiver form as a condition of counseling but that he did not want to be prosecuted, and he asked her what he should do. She told him, "Well, you should go and take your counseling right now, that's the first thing. It's been a long time since this occurred, but I cannot give you advice because . . . I'm a prosecutor, I prosecute these types of cases" (R. M-81).

Following this conversation, Reynolds returned to the Family Children's Service Center and signed the waiver form.

After Reynolds signed the waiver and began participating in counseling sessions, Marcia Meyer, the counselor, called him and told him that the police wanted to see him, Ms. Meyers asked Reynolds where it would be most convenient for him to meet with the police and he said he would meet with them in Marcia Meyer's office.

Trooper Norman testified that "I was just there trying to find

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(Cont'd)

> Notwithstanding any other provisions of law, including any law on privileged communications, each health practitioner, police officer, or educator or human service worker, acting in a professional capacity, who has reason to believe that a child has been subjected to abuse, shall notify the local department or appropriate law enforcement agency.

Md. Code Ann. Family Law § 5-704(a)(1)(i).

out, you know, about an investigation on a child abuse. That's why I was sent there," and that he "was there to ask Mr. Reynolds why he had made the statements or what statements he had made to Family Children's Service Center and — why he was making the statements 'cause, at that point, I didn't have a victim; I didn't even know the daughters' names." (R. M-61). Trooper Norman later testified that when Reynolds told Marcia Meyer he had abused his daughters, she contacted the State's Attorney's Office who in turn contacted the State Police (R. M-58).

Norman identified himself to Reynolds as a Maryland State Policeman and, when he asked Reynolds if Reynolds knew why he was there, Reynolds said that he had made some statements to Ms. Meyer, and when Norman asked if Reynolds could tell him the same things, Reynolds said that "whatever I tell you is going to incriminate me . . . 'cause I'm considered an abuser." (R. M-60). Reynolds testified (R. M-91) and the trial court found, that Reynolds had "jokingly or at least lightly" (p. 50a) asked Norman to read him his *Miranda* rights, which Norman did.

Reynolds then told Norman that he was an abuser because he had touched all his daughters when they were young but that nothing had occurred in twelve years. Reynolds also said that he could not remember many of the incidents but he told Norman the full names of all his daughters and where Norman could contact them (R. M-23-24). Reynolds testified that he had "blacked" out most of the things his family said had happened but that Marcia Meyer had told him that he had to be honest with everyone and that he could not get counseling unless he was honest (R. M-83).

Following the session in Marcia Meyer's office, Trooper Norman interviewed two of Reynold's daughters.

On September 6, 1989, the Trooper came to Reynolds' farm

to interview him there, saying that he wanted Reynolds to try to remember the events as closely as he could, because "it's for Crystal's good because if you can't remember them, she doesn't think anybody believes her that it didn't happen and so I was to try to remember because I would really be helping my daughter, that — she needed that for her own mental health." (R. M-85).

The ensuing interview was taped. Norman said, "You're not under arrest . . . (s)ame situation down in — in Ms. Meyer's office. All I want to do is just get some information from you, hear your side of the story again and, you know, you don't have to talk to me. If you want me to leave, I'll leave, you know." Reynolds asked, "Why do you want to hear it again? So you can record it, is that it?" (R. SP-1).

Norman said that he had spoken with Crystal and Vivian, the two daughters, and that Crystal had told him a lot of things and Norman wanted to find out "if you have remembered anything more that happened between you and Crystal." (R. SP-3).

Norman then led Reynolds into a discussion of various explicit sexual acts occurring between him and Crystal (R. SP-1-44 generally).

At one point, Reynolds asked, "Well, why do you need those times?" and Norman replied "Because I'm trying to verify what she's telling me." Reynolds replied "But, you're not arresting me. Why do you need to know every little detail?" and Norman responded that "it's important for her to understand, you know, and that — that I can — I can say, yes, you know, I talked to your dad and — and he's saying that everything that happened . . ." (R. SP-8).

Again, the Trooper questioned Reynolds about a number of specific sexual acts, referring on several occasions to Ms. Meyer,

saying that "they — they kinda want you to remember this stuff, right, cause you can deal with it?" (R. SP-22). Trooper Norman later testified that Reynolds said he couldn't remember things, that he was blocking out his memory and that, from the Trooper's "understanding in counseling, you can't be helped unless you do remember what you're being helped for." (R. M-68).

At no time during this second interview did Trooper Norman advise Reynolds that he had the right to remain silent, that anything he said could be used against him in a criminal proceeding, and that he had the right to an attorney.

Two days later, September 8, Trooper Norman returned to Reynolds' home and arrested him. He read him his rights in the car on the way to the barracks.

After his arrest, Norman said to Reynolds, " 'You must think you're awfully smart . . . all this counseling that youve been going to . . . you haven't incriminated yourself at all in this counseling.' " Reynolds replied, " 'I'm going to counseling to get help for what I did wrong. What do you mean, incriminating myself?' And, evidently, everything I was saying' they was turning it over to the police and I had no — I didn't understand that at all " (R. M-87).

Reynolds was subsequently charged with Second Degree Rape, Second Degree Sexual Offense, Assault with Intent to Rape, Assault with Intent – Sexual Offense, Child Abuse, Third Degree Sexual Offense and Incest.

How the Federal Question Was Presented

The petitioner moved to suppress all incriminating statements he had made to the police before his formal arrest as well as the tape of his confession on Fifth and Fourteenth Amendment grounds (and also on state grounds). (Defendant's Motion to Suppress:

"That all admissions, statements, or confessions of the defendant be suppressed because they were obtained unlawfully, involuntarily, forcibly and in violation of the defendant's Constitutional and other legal rights." The trial court denied the motion and, following a trial by jury, petitioner was found guilty of Second Degree Rape, Second Degree Sexual Offense, Assault with Intent to Rape, Assault with Intent to Commit Second Degree Sex Offense, and Incest and was sentenced to serve fifty years on the various counts.

An appeal was taken to the Court of Special Appeals of Maryland, which affirmed the Circuit Court's denial of petitioner's Motion to Suppress. The Court of Special Appeals held that the petitioner's confessions were voluntary under the due process clause (pp. 45a-46a) and that the warnings prescribed in *Miranda v. Arizona, infra,* did not apply to petitioner's second confession in his home because he was not undergoing custodial interrogation (pp. 41a-45a).

The Court of Appeals of Maryland then granted Reynold's Petition for Certiorari and affirmed the decision of the Court of Special Appeals, adopting the argument of the Court of Special Appeals that *Miranda* warnings were unnecessary because there was no custodial interrogation (p. 19a), and holding the Reynolds' confessions were voluntary on both state voluntariness and federal due process grounds (p. 18a).

REASONS FOR GRANTING THE WRIT

I.

THE PROSECUTOR FAILED TO WARN PETITIONER ADEQUATELY ONCE SHE ADVISED HIM TO SEEK COUNSELING.

Reynold's initial contact with the State occurred when he telephoned the State's Attorney's office for advice as to whether he should sign the mandatory waiver form in order to obtain counseling. He did not need to confess (contrary to the Court of Special Appeal's statement at p. 26a that "he needed to confess and he wanted to confess"); he needed counseling. In order to get the counseling he needed, he had been told that any information he gave the therapist would be turned over to the police and, because he did not want to be prosecuted, he needed legal advice.[2]

Knowing that Reynolds was trapped between fear of prosecution on the one hand and a desperate need for counseling on the other, the prosecutor gave him the ultimately fatal advice that "(W)ell, you should go and take your counseling right now,

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2. "So she (the therapist) told me that I had to go to the — sign a thing that if I did anything illegal they might turn it over to the police, and I asked her about that. Well, she said you can't take counseling here unless you sign this because I cannot do it with you. So, that worried me, so I called this young lady, who's sitting right here (indicating the prosecutor), up on the phone, then . . . and I asked her for advice . . . so Iasked Kathi what I should do and she said, well you should go and take your counseling right now, that's the first thing. It's been a long time since this occurred, but I cannot give you advice because if — I — it may, in the future, — I'm — I'm a prosecutor, I prosecute these types of cases and . . . so Iwent back and — and I signed the papers and we started going to counseling and we started going to the meetings and then Marcia Meyer (the therapist) called me on the phone and told me that the police would like to have an appointment with me." (R. M-80-82).

that's the first thing." (R. M-81).

Having elected to speak with Reynolds, and having elected to advise him to seek counseling, due process requires that, at a minimum, the prosecutor inform him that he should consult with his own attorney.

Under the totality of the circumstances, the absence of any warning, by the prosecutor, least of all a full *Miranda* warning, is critical to a determination of whether Reynolds' ensuing (and, once he signed the waiver form, inevitable) confession to the police was voluntary. [See, e.g., *Beckwith v. United States*, 425 U.S. 341, 347, 96 S. Ct. 1612, 1616, 48 L. Ed. 2d 1 (1976) and *United States v. Mandujano*, 425 U.S. 564, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (1976); in neither instance did the Court hold that no warnings at all need be given; it simply held that the partial warnings that were given were appropriate to the situation since the petitioners had not been subjected to "custodial interrogation"].[3]

While this Court has allowed some police deception in obtaining confessions, it has never given blanket authority to the police to employ whatever deception they may deem necessary in order to secure unwarned confessions. If this were so, the efficacy of the due process protections developed over the years would be cancelled. For example, this Court, in *Colorado v. Spring*, 479 U.S.

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3. The record reflects that the trooper, at Reynolds' own request, did read Reynolds his *Miranda* rights. It cannot be seriously contended that this was a "real" *Miranda* warning. The words were read, but the atmosphere was joking (p. 50a). Under the circumstances of this case, the police officer's reading of *Miranda* did absolutely nothing to cure the prosecutor's advice to seek counseling. Indeed, it may have underscored Reynolds' belief that if the police had evidence he had sexually abused his daughters they could force him to continue counseling by holding the threat of jail over his head (R. M-82-84).

564, 10 S. Ct. 851, 93 L. Ed. 2d 954 (1987), noted that "(i)n certain circumstances, the Court has found affirmative misrepresentations by police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege," citing *Lynum v. Illinois*, 372 U.S. 564, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963) and *Spano v. New York*, 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) (misrepresentation by suspect's police officer friend that the officer would lose his job if the suspect did not cooperate rendered the admission involuntary).

It is also significant that the confession in the therapist's office was induced by the prosecutor who is held to a different standard from the police [*see, e.g.*, Maryland Rule of Professional Conduct 3.8: Special Responsibilities of a Prosecutor and the ABA Standards of Criminal Justice Relating to Prosecution Function]. Reynolds did not call the police to pose his dilemma; he called the State's attorney.

The Court of Appeals stated that although the prosecutor "may have induced Reynolds to speak to the counselors; in no way did she attempt to induce him to speak to the police" (at p. 18a). The point is that the prosecutor knew when she induced Reynolds to speak to the counselor that the police would become involved. This is why Reynolds called the prosecutor, not to discover whether the police would be involved, but whether this involvement would result in prosecution.

The involvement of the prosecutor and the police in the therapeutic process was very real in this case, and this Court should grant certiorari in order to determine to what extent the State and health professionals may join forces to extract incriminating information from patients.

II.

A. THE PETITIONER SHOULD HAVE BEEN GIVEN A *MIRANDA* WARNING BEFORE THE INTERROGATION AT HIS HOME.

In affirming the decision of the Court of Special Appeals, the Court of Appeals simply adopted that court's reasoning that the warnings prescribed in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 682 (1966) were unnecessary when applied to the second, taped confession taking place at Reynold's home.

The Court of Special Appeals held that *Miranda* warnings were unnecessary because Reynolds was not in custody.

The possibility that police might circumvent the necessity of giving *Miranda* warnings was foreseen by Justice Marshall in his dissent to *Oregon v. Mathiason*, 429 U.S. 477, 499, 97 S. Ct. 711, 716, 50 L. Ed. 2d 701 (1977) where he noted (at fn. 5), "I trust today's decision does not suggest that police officers can circumvent *Miranda* by deliberately postponing the official 'arrest' and the giving of *Miranda* until the necessary incriminating statements have been obtained."

In *Berkemer v. McCarty*, 468 U.S. 420, 442, 102 S. Ct. 3138, 3151, 82 L. Ed. 2d 317 (1984), this Court did confront that issue. Holding that a "policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation," the Court also noted, at 468 U.S. 440, 104 S. Ct. 3150, that "the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to 'a degree associated with formal arrest.' " The Court admitted that "our adherence to the doctrine just recounted will mean the police and lower courts will continue

occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops *or a rule that a suspect need not be advised of his rights until formally placed under arrest* (emphasis added) would provide a clearer, more easily administered line . . . (E)ach of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede enforcement of the Nation's traffic laws . . . (t)he second would enable police to circumvent the constraints on custodial interrogation established by *Miranda.*"

Neither the intermediate appellate court nor the Court of Appeals addressed the issue of the police officer's deliberate delay for the purpose of extracting a confession from Reynolds and neither court even agrees that this is an issue in the case. Not only does this conflict with this Court's holding in *Berkemer*, it is an issue which this Court needs to squarely address in the context of what is clearly a lengthy interrogation of a suspect on whom the police had already obtained more than enough information to justify an arrest, but from whom they wanted to obtain a corroborating confession.

Miranda did not put the straitjacket of "custodial interrogation" on itself since the Court expressly dealt with "the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while at the station or otherwise deprived of his freedom in any significant way," at 384 U.S. 477, 86 S. Ct. 1629. Subsequent Supreme Court opinions effectively narrowed *Miranda* to a holding of custodial interrogation while at the police station. When this proved to be inadequate in some situations, other settings were found as coercive, as was the case in *Orozco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095, 22 L.Ed. 2d 311 (1969) (interrogation at suspect's home, *Miranda* warning required) and *Beckwith v. United States, supra* (interrogation at suspect's home,

Miranda warning not required, but partial warning given).[4]

However, these environmental extensions did not deal with instances where the police deliberately delayed making an arrest in order to avoid *Miranda*, as Justice Marshall had foreseen in *Mathiason* and as the *Berkemer* majority expressly recognized.

It is apparent that a reasonable person in Reynolds' position would have felt that his freedom was curtailed in a significant way during his second "interview" with Trooper Norman, and that at those times when Reynolds did express this feeling, the trooper deceptively reassured him.

Reynolds initially asked why the trooper was at his house and why he needed more information. The trooper replied evasively and, instead of answering, led Reynolds into a discussion of sex with Crystal (R. SP-1-3).

Later, Reynolds told the trooper, "You're not arresting me, why do you need every little detail?" and the trooper replied that it was important for his daughter to understand that her father had confirmed everything that she had told the trooper (R. SP-7-8). The trooper again reassured Reynolds that he was not under arrest by telling him that "you know, you could have been arrested for this fifteen years ago," (R. SP-36) with the clear inference that he won't be arrested now.

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4. In *New York v. Quarles*, 467 U.S. 649, 654, 104 S. Ct. 2626, 2630, 81 L. Ed. 2d 550 (fn. 4) (1984), Justice Rehnquist, writing for the majority, noted that "*Miranda* on its facts applies to station house questioning, but we have not so limited it in our subsequent cases, often over strong dissent," citing, in addition to *Orozco, supra, Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (police car), and *Mathis v. United States*, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968). However, cases such as *Beckwith, supra*, certainly suggest that *Miranda* often was so limited, until the effects of that limitation became painfully obvious.

As Reynolds later testified, ". . . (H)e kept asking me so many things. I-I beginning to wonder, is he trying — does he want to arrest me or something? Why would he need to know all this just for Crystal and — and it scared me then, but I continued to go on because I felt that I had to be honest with the people. I wanted to get help and — and my counselor, who already told me that I needed — I needed to be very honest, I had to be honest with everybody, I could not get counseling unless I was honest." (R. M-86).

The only reason why there was no need to arrest Reynolds on September 6 (the second interrogation) is that the trooper knew Reynolds was not going anywhere. Had the trooper arrived and found Reynolds packing his bags, it is inconceivable that he would not have been arrested immediately. He only wanted to obtain a taped confession, and he delayed Reynolds' arrest in order to do so without having to give him a *Miranda* warning.

Furthermore, the place where the interrogation occurred, Reynolds' farmhouse, as the place where the sexual abuse also occurred, was the most coercive possible environment under the circumstances.

It was precisely this circumvention of *Miranda* which this Court addressed and rejected in *Berkemer* which has now been sanctioned by Maryland's highest court.

B. THE PETITIONER'S SECOND CONFESSION WAS INVOLUNTARY UNDER THE FOURTEENTH AMENDMENT.

Reynolds' second confession took place in his own home under circumstances at least as egregious as the first. The police officer deceptively reassured Reynolds that he had not come to arrest him and that he needed Reynolds' confession to help Crystal, Reynolds' sexually abused daughter, by taping an exhaustive

recollection of Reynolds' various sexual activities, which would also help Reynolds in his counseling sessions.

The police officer's conduct was far from that condoned in *Colorado v. Spring, supra*, for example, where the police did not tell Spring the subject of their questions before giving him *Miranda* warnings. Because the police had arrested Spring for firearms violations, when their real, undisclosed concern was murder, Spring had assumed they would ask him about the firearms when he waived his *Miranda* rights. Instead, they interrogated him about a murder and he subsequently challenged the validity of his confession. Since the offensive conduct in *Spring* was "official silence," and since there was no allegation that Spring misunderstood the consequences of speaking with law enforcement officials, Spring's *Miranda* waiver and confession were held voluntary. *Spring* at 479 U.S. 575, 107 S. Ct. 858.

Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) directs that where an accused has made several confessions, as here, "the surrounding circumstances and the entire course of police conduct with respect to the suspect" should be evaluated in determining voluntariness.

In this case, in an extremely sophisticated form of interrogation, the prosecutor and the police acted in concert with the therapist to induce Reynolds not only to reveal the names of his victims, but to then elaborate on the details of their statements to the police. Throughout this entire process there was never a serious suggestion by anyone that Reynolds might want to consult his own attorney.

At one time, Maryland courts had acknowledged what they presently reject: that "the road to a civilized society leads past the use of the 'rubber hose,' the 'rack,' the 'Chinese boot,' and other 'third degree' methods of obtaining 'confessions' from persons

accused of the commission of criminal acts," and that " ' "(s)ince *Chambers v. Florida*, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." ' " *Bryant v. State*, 49 Md. App. 272, 431 A.2d 714 (1981), citing *Miranda v. Arizona, supra.*

CONCLUSION

For these various reasons, this petition for certiorari should be granted and the judgments of the Court of Appeals of Maryland and the Court of Special Appeals of Maryland affirming the petitioner's conviction reversed, and the case remanded to the Circuit Court for Carroll County, Maryland with instruction to suppress the petitioner's confessions.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEALS OF MARYLAND FILED AUGUST 24, 1992

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 121

September Term, 1991

FREDERICK WILLIAM REYNOLDS, JR.

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki
Bell

JJ.

Opinion by Chasanow, J.
Eldridge, J. concurs in result only

Filed: August 24, 1992

There are several links in the long chain that brings this case to us. The first — and certainly not the least — is when members of the family of Frederick William Reynolds, Jr., confronted him, late in the spring of 1989, with dark secrets two of his adult daughters had just shared with them. For years, according to the women, Reynolds had sexually abused them at the family farm in Carroll

County when they were children; one he had repeatedly raped throughout her youth and into her adolescence. Now in his 50s with the girls grown, Reynolds was no longer engaged in criminally incestuous behavior. But also now there were granddaughters, and Crystal, the eldest daughter and the one who had suffered the most, feared for them. That fear led her to tell other family members what had happened to her; she learned she was not the only daughter who had been sexually abused. The family then confronted Reynolds and urged him to get help.

Reynolds went to a pastor, who counseled him and other family members for a period of time. The cleric's schedule did not allow him to see Reynolds very often that summer, so he suggested that Reynolds seek further help from an organization called Family Children's Service Center in Westminster. Reynolds agreed and phoned for an appointment.

When Reynolds arrived at the Center, he spoke there with a woman named Marcia Meyer. Reynolds testified later, "She said that I had to be very honest with them, that they would take me on, that they had lots of patients like I was and they would — they could help." But Meyer told Reynolds that he would have to sign a form authorizing her organization to notify the police of any evidence implicating him as a child abuser. Reynolds asked Meyer about the form, and "she said you can't take counseling here unless you sign this because I cannot do it with you."[1]

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1. Under Maryland law, "each health practitioner . . . acting in a professional capacity, who has reason to believe that a child has been subjected to . . . abuse, shall notify the local department or the appropriate law enforcement agency. . . ." Maryland Code (1984, 1991 Repl. Vol.), Family Law Article, § 5-704(a)(1)(i).

Appendix A

Uncertain what to do, Reynolds telephoned the Carroll County State's Attorney's office and spoke with Assistant State's Attorney Kathi Hill. The call was unexpected, and Hill tried to be both cautious and candid. According to Reynolds, she told him, "Well, you should go and take your counseling right now, that's the first thing." Hill added, "It's been a long time since this occurred, but I cannot give you advice because if — I — it may, in the future, — I'm — I'm a prosecutor. I prosecute these types of cases."

Reynolds wanted help and assumed that all counselors would have the same policy about reporting to the police as did the Family Children's Service Center (the Center).[2] Accompanied by his wife, Agnes, he went to the Center and signed the form.

After Reynolds' counseling program was underway, Meyer called Reynolds and told him that the police wanted to talk with him. It was not part of the program, she said, and he did not have to discuss anything with the police if he did not want to. Still Reynolds agreed to meet Corporal Richard E. Norman of the Maryland State Police at the Center. He agreed to speak with Norman, Reynolds later testified, because "that's what my children had told me they wanted; they weren't interested in prosecution or jail." On July 11, 1989, Norman came to interview Reynolds at the Center.

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2. Conceivably, Reynolds could have considered going to another pastor for counseling on the theory that confidential communications to such an individual are not covered by the disclosure requirements set forth in § 5-704 of the Family Law Article. *See* Md. Code (1984, 1989 Repl. Vol.), Courts & Judicial Proceedings Art., § 9-111, and Family Law Art., § 5-705(a)(3). We express no opinion on whether such communications would, in fact, be protected, since that issue is not before us. We merely note that Reynolds did not pursue that possible alternative in his quest for counseling.

Appendix A

Norman introduced himself and told Reynolds that he understood "some statements" had been made to Meyer; would Reynolds now "tell me the same things?"

"Well," Reynolds replied, "whatever I tell you is goin' to incriminate me." Norman asked what he meant, and Reynolds explained, "Well, I'm an abuser — I'm considered an abuser."

At that point, Norman told Reynolds that he did not have to say anything. Reynolds then asked for "his rights," though he later testified that he had made this request "jokingly." Nevertheless, Norman obliged, reading the "Miranda rights" aloud from a printed card he carried.[3]

According to his testimony, Norman also advised Reynolds that "he wasn't under arrest and he didn't have to talk to me; I mean, he didn't have to say a thing to me." Again, Reynolds acknowledged that he would be "incriminating" himself. The July 11 interview began and lasted "anywhere from fifteen minutes to an hour."

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3. According to Norman, this is what he told Reynolds:

> "You have the absolute right to remain silent. If you choose to answer, your answers can be used against you in court. You have the right to a lawyer. If you want a lawyer and cannot afford one, one will be provided for you. You have the right to talk privately with your lawyer before answering any questions and have him with you during the questioning. If you would like to answer questions without having a lawyer present, you have the right to stop at any time and obtain the services of a lawyer."

See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

Appendix A

Reynolds talked about sexually touching all four of his daughters, starting with each when she was about ten years old. As for Crystal, there was more than touching; he had sexual intercourse with her periodically until she was well into her high school years. Reynolds told Norman where and how he might be able to contact his daughters.

After the interview, Norman pursued his investigation, eventually talking at length with Crystal and with Vivian, the second daughter. Over a period of time both women gave detailed accounts of how they were abused by their father. After a long interviewing session with Crystal on September 6, 1989, Norman decided to speak again with Reynolds. That afternoon, he went to Reynolds' home. Reynolds was not there, so Norman waited. Shortly after 4 P.M. Reynolds showed up, and the investigator asked if he could speak with him because Crystal "had told me things." Reynolds said, "Fine," and the two men went inside.

According to Reynolds' testimony later, Norman "explained to me that he wanted me to try to remember the events as closely as I could and I couldn't understand that and he says, 'It's for Crystal's good because if you can't remember them, she doesn't think anybody believes her, that it didn't happen,' and so I was to try to remember because I would really be helping my daughter, that — she needed that for her own mental health. . . ."

Eventually Norman's second interview with Reynolds began. This time, their conversation was tape-recorded.

"First of all, you're not under arrest, okay, like I told you a bit earlier," Norman advised Reynolds. "Same situation down in — in Mrs. Meyer's office. All I want to do is just get some information from you, hear your side of the story again and, you know, you don't have to talk to me. If you want me to leave, I'll leave, you know."

Appendix A

Reynolds talked about his sexual episodes with Crystal and Vivian. At times he corroborated what his daughters had told Norman about some of the events; other incidents from the past he disputed or could not remember. When Norman began to follow up after Reynolds acknowledged threatening Crystal to get his way, Reynolds asked, "Well, why do you need those times?"

"Because I'm trying to verify what she's telling me," Norman responded.

"But you're not arresting me," continued Reynolds. "Why do you need to know every little detail?"

"Because it's important for her to understand," Norman replied, "you know, and that — that I can — I can say, yes, you know, I talked to your dad and — and he's saying that everything that happened. . . . ." At that moment, Reynolds interrupted Norman to get the phone. When he came back ten minutes later, Agnes was with him.

Norman reopened the interview with these words: "You realize I'm — I'm not gonna arrest you today. All I want to do is just talk to you, you know, and you're not under arrest and I can leave — you want me to leave any time you want, so I [inaudible] understand that. Do you understand that?" Reynolds indicated he did, and the conversation continued until just before 5:20 P.M.

Two days later, Norman returned and arrested Reynolds, who was eventually charged with several sexual offenses against Crystal and Vivian.

Appendix A

Before trial, Reynolds moved to suppress the incriminating statements he had made to Norman. The trial court denied the motion, finding that Reynolds had confessed freely and voluntarily to the State Police investigator. Neither Marcia Meyer nor anyone else from the Family Children's Service Center testified about anything Reynolds said in counseling. The only statements by Reynolds introduced into evidence were those he had made directly to Norman. After a two-day trial, a Carroll County Circuit Court jury found Reynolds guilty of second degree rape, two counts of second degree sexual offense, assault with intent to rape, assault with intent to commit second degree sex offense, and incest. On June 5, 1990, Judge Donald Gilmore sentenced Reynolds to a total of 50 years in prison.

Reynolds appealed, but the Court of Special Appeals affirmed the judgment against him. *Reynolds v. State*, 88 Md.App. 197, 594 A.2d 609 (1991). Reynolds petitioned this court for a writ of certiorari, which we granted.

As was the case in the Court of Special Appeals, Reynolds' attack on his convictions focuses on the statements he gave to Norman. He challenges their introduction into evidence, claiming that they were the result of improper inducement and violative of his due process rights. In support of his contention, Reynolds relies on both constitutional and common law arguments. For the following reasons, we, too, decline to set aside his convictions.

THE FIRST CONFESSION

Reynolds complains that what Assistant State's Attorney Kathi Hill told him during their brief telephone conversation induced him to confess. Therefore, he argues, his subsequent statements to Norman were involuntary. He further contends that

Hill should have warned him about "the consequences of seeking counseling." Under Reynolds' reasoning, Hill's failure to do so led him to make admissions to the counselors, which in turn led to his admissions to Norman and thus rendered his statements inadmissible.

Reynolds bases his argument on both constitutional and common law voluntariness grounds. The State contends that the issue of common law voluntariness was waived because Reynolds failed to present it with specificity to the trial court; the Court of Special Appeals agreed. 88 Md. App. at 219-221, 594 A.2d at 620. Reynolds claims the issue was raised when, in his motion to suppress, he argued that his confession was admitted in violation of "other legal rights," citing a host of common law voluntariness cases included *Stokes v. State*, 289 Md. 155,423 A.2d 552 (1980); *Hillard v. State*, 286 Md. 145, 406 A.2d. 415 (1979); and *Bellamy v. State*, 50 Md.App. 65, 435 A.2d 821 (1981), *cert. denied*, 292 Md. 376 (1982). Reynolds further asserts that he specifically adopted the arguments and points and authorities contained in his motion at the suppression hearing. Because Reynolds' common law voluntariness contentions are intertwined with his consitutional voluntariness contentions, we are going to assume that the issue was raised below. But we caution defense counsel that they must be precise when they craft such motions and when they argue them at suppression hearings. It is an attorney's obligation to present with clarity all issues that must be resolved by a trial judge, whose responsibilities include making sure that proper evidence is presented to those entrusted with determining guilt or innocence. In the future, we will be less inclined to review an issue such as the one on common law voluntariness that Reynolds says was included in his scattergun motion but which was not specifically argued and clearly identified at the suppression hearing.

Appendix A

Originally common law confessions were admissible even if they had been wrung from hapless suspects by torture. W. LaFave & J. Israel, 1 *Criminal Procedure*, § 6.2, at 439 (1984) (hereinafter *LaFave & Israel*). In 1775, Lord Mansfield first articulated what Wigmore would later characterize as the initial expression of the requirement that a confession be voluntary in order to be admissible against a criminal defendant. In that early elucidation, Lord Mansfield specifically referred to promises as one of the factors that might render a confession inadmissible. He stated:

> "The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial."

Rudd's Case, 1 Leach Cr. C. 115, 118, 168 Eng. Rep. 160, 161 (1775), *quoted in* 1 *McCormick on Evidence*, § 146 (4th ed. 1992) (hereinafter *McCormick*.) *See* 3 Wigmore, *Evidence* §§ 818-19 (Chadbourne rev. 1970) (hereinafter *Wigmore*). The common law approach was to identify inducements that might make a confession unreliable or even false. Actual or threatened physical harm, promises to be lenient upon conviction or not to prosecute, and deceptive interrogation came under scrutiny. *See LaFave &Israel* § 6.2, at 443.

Examination of a confession's "voluntariness" can be made both under a constitutional due process analysis and by application of state evidentiary laws. *See generally* 1 *McCormick* §§ 146-47, at 564-74. When analyzing whether a confession was voluntary under due process standards, "[t]he test is of the totality of the circumstances. All of the circumstances of the interrogation, and

the particular characteristics of the accused must be examined. Generally, no one factor is dispositive." D. Nissan et al., *Law of Confessions*, § 1:9 (1980, 1991 Cum. Supp.) (hereinafter, *Law of Confessions*). "[W]hether [a] confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances." *Haynes v. Washington*, 373 U.S. 503, 513, 83 S. Ct. 1336, 1343, 10 L.Ed. 2d 513, 521 (1963).

It is clear that coercion by government agents is a necessary ingredient to a determination that a defendant's confession should be suppressed because the defendant's constitutional due process rights have been violated. "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473, 482 (1986).

Determining voluntariness under common law principles, as opposed to constitutional due process requirements, may require an additional inquiry. "Generally, the approach under the common law rule was to identify certain inducements which made a confession unreliable. These included actual or threatened physical harm, a promise not to prosecute, a promise to provide lenient treatment upon conviction, and deceptive practices so extreme that they might have produced a false confession." *LaFave & Israel* § 6.2, at 440. This Court has held that, regardless of constitutional imperatives, Maryland law demands that confessions "be shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary." *Hillard*, 286 Md. at 150, 406 A.2d at 418.

In harmony with the approach taken in federal constitutional

analysis, Maryland has for the most part applied a "totality of the circumstances" rule when appraising the voluntariness of confessions under state nonconstitutional law. *See Hoey v. State*, 311 Md. 473, 483, 536 A.2d 622, 627 (1988); *Lewis v. State*, 285 Md. 705, 721, 404 A.2d 1073, 1081 (1979). *See also State v. Kidd*, 281 Md. 32, 36, 375 A.2d 1105, 1108, *cert. denied*, 434 U.S. 1002, 98 S.Ct. 646, 54 L.Ed.2d 498 (1977).

One area that has attracted special attention with respect to voluntariness — both under common law and constitutional due process requirements — concerns promises made to suspects being interrogated. 1 *McCormick* § 154. It is the defendant's sensitivity to inducement while in custody and the potential impact of the promise of leniency that render the confession inadmissible. Courts abhor, or at least find distasteful, promises of leniency or immunity made by state agents to defendants subject to the vulnerability of custodial interrogation. In contrast, however, courts permit and perhaps even encourage promises of leniency through reduced charges or lower sentences made by prosecuting attorneys that induce criminal defendants to admit their culpability and plead guilty. *Cf. Wright v. State*, 307 Md. 552, 515 A.2d 1157 (1986).

The reasons that promises of leniency may render a confession inadmissible were discussed by the Supreme Court in *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970):

> "[When] a confession [was] given by a defendant in custody, alone and unrepresented by counsel . . . even a mild promise of leniency was deemed sufficient to bar the confession . . . because defendants at such times are too

> sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."

Id. at 754, 90 S.Ct. at 1472, 25 L.Ed.2d at 759.

In *Arizona v. Fulminante*, __ U.S. __, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Supreme Court made it clear that constitutional voluntariness does not require that all promises, threats, or inducements render a confession involuntary; instead, the federal constitution requires only that courts consider promises, threats, or inducements as part of the totality of the circumstances that courts must look at to determine voluntariness.

In *Law of Confessions*, the authors observed that state courts developed a per se rule of exclusion to apply when the following elements were met in cases involving promises of leniency or immunity:

> "1. Promise of benefit or advantage.
>
> 2. Made by a person of official or apparent official authority.
>
> 3. The suspect would not have confessed but for the promise.
>
> 4. The suspect's conclusion that he had received an offer was objectively reasonable."

Law of Confessions §1.12, at 23-24. In the 1991 supplement to their work, however, they note that there is "a pronounced trend away from" per se exclusion and "toward a totality of the circumstances approach." *Id.* § 1:12, at 13 (1991 Cum. Supp.).

McCormick also notes that judicial rejection of the per se analysis in favor of a totality of the circumstances approach has increased the need for determining the impact of promises on particular defendants in particular interrogations. 1 *McCormick* § 154, at 615. *See State v. Strain,* 779 P.2d 221, 227 (Utah 1989) (Case remanded for a determination whether, under the totality of the circumstances, the defendant was so affected by improper promises that his confession was involuntary). In 1987, after holding a confession voluntary notwithstanding a firm promise of leniency made by the police, the Eleventh Circuit noted:

> "[A]lthough it was at one time suggested that any indication of leniency was both a necessary and a sufficient condition of a finding of involuntariness *(Bram v. United States,* 168 U.S. 532, 542-43, 18 S.Ct. 183, 186-87, 42 L.E. 568[, 573] (1897)), the law today is that such an indication is a necessary but not itself a sufficient condition. Or to borrow a familiar concept from another area of the law, it is not enough for the indication of leniency to bear a but-for relationship to the confession in a purely temporal sense (that is, simply to show the defendant would not have raised the subject by speaking of potential benefits). Instead the but-for test is one of proximate cause in the overborne-will sense: whether the police promise caused a deprivation of free will on the part of the then suspect."

Cole v. Lane, 830 F.2d 104, 109 (7th Cir. 1987), *cert. denied,* 484 U.S. 1076, 108 S.Ct. 1053, 98 L.Ed.2d 1015 (1988). See also *Green v. Scully,* 850 F.2d 894 (2d Cir.), *cert. denied,* 488 U.S. 945, 109 S.Ct. 374, 102 L.Ed.2d 363 (1988), where the court said:

> "A reading of our own decisions reveals that the presence of a direct or implied promise of help or leniency alone has not barred the admission of a confession where the totality of the circumstances indicates it was the product of a free and independent decision . . . Other circuits also conclude that promises do not require an analysis separate from or different than the totality of circumstances rules . . . Thus, the inquiry in each case is whether such a promise overbears a suspect's will, as the promise of leniency did in *Bram*, either alone or in conjunction with other factors." (Citations omitted).

850 F.2d at 901.

Maryland has followed the old common law rule, which has seemed to adopt a per se exclusion rule that official promises of leniency to a defendant in custody that induce a confession render the confession inadmissible. In a line of Maryland cases reaching back into the last century, this Court has explored challenges to the voluntariness of statements made by suspects who had been offered promises. If a confession "had been induced by any threat of harm, or promise of wordly advantage held out to him by [the interrogating detective], or by his authority, or in his presence and with his sanction, it ought to be excluded" *Nicholson v. State*, 38 Md. 130, 153 (1873).

A mere exhortation to tell the truth is not enough to make a statement involuntary. *See Ralph v. State*, 226 Md. 480, 486, 174 A.2d 163, 166 (1961), *cert. denied*, 369 U.S. 813, 82 S.Ct. 689, 7 L.Ed.2d 613 (1962). *See also State v. Rochster*, 391 S.E.2d 244, 247 (S.C. 1990) (Polygraph examiner's statement that it would be in suspect's interest to tell the truth did not offer a "hope of reward

or benefit.") An entreaty to "tell the truth" coupled with a promise that there would be benefits to the suspect, however, can render the statement involuntary. In *Biscoe v. State*, for example, a confession was inadmissible because the suspect was told "that it would be better for him to tell the truth, *and have no more trouble about it.*' 67 Md. 6, 7, 8A. 571, 572 (1887) (emphasis added). The declaration, "Tell the truth about it. You've got nothing to fear *if* you tell the truth, and you weren't in it," was also seen as an improper inducement by a plurality of the Court in *State v. Dobbs*, 148 Md. 34, 61, 129 A. 275, 286 (1925) (Offutt, J., concurring) (emphasis added). For a discussion of the difference between exhortations and inducements, see *Clark v. State*, 48 Md. App. 637, 644-45, 429 A.2d 287, 292, *cert. denied*, 291 Md. 773 (1981).[4]

From our precedents, we distilled the following common law

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4. In *People v. Hill*, 426 P.2d 908, 916 (Cal.), *cert. denied*. 389 U.S. 993, 88 S.Ct. 492, 19 L.Ed.2d 487 (1967), and 390 U.S. 911, 88 St.Ct. 838, 19 L.Ed.2d 884 (1968), the Supreme Court of California said that police exhortations to a suspect to tell the truth without threats or promises did not render a confession involuntary. The suspect in that case had been urged to "help himself" by considering his own interests against those of his codefendants.

> "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in thenature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible."

principle on promises:

> "[I]f an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration, and he makes remarks in reliance on that inducement, his declaration will be considered to have been involuntarily made and therefore inadmissible."

Hillard v. State, 286 Md. at 152-53, 406 A.2d at 420. "The rule in *Hillard* announces that a statement is rendered involuntary if it is induced by any official promise which redounds to the benefit or desire of the defendant." *Stokes v. State*, 289 Md. at 160, 423 A.2d at 554. One common thread that runs through our cases is that the promise must have caused the suspect to confess. If a suspect did not rely on an interrogator's comments, obviously, the statement is admissible regardless of whether the interrogator had articulated an improper inducement. By definition, there would have been no "inducement" at all, because the interrogator "induced" nothing. See *Ralph v. State* in which we said, "[T]he court besides finding out whether an inducement held out to the accused should also ascertain whether he had been influenced by such inducement in making the confession." We noted that there was nothing in that case "to show what *effect* the statement had on the defendant." 226 Md. at 486-87, 174 A.2d at 166 (emphasis added). *See also State ex rel. Collins v. Superior Court*, 702 P.2d 1338, 1340 (Ariz. 1985) ("[T]he promise must *induce* the defendant to waive his fifth amendment rights. If defendant did not rely on the promise, he certainly was not induced by it to make a statement.") (Emphasis in the original).

We note that Hill was responding to Reynolds' unsolicited

telephone call; Reynolds was not under any kind of custodial restraint or compulsion. Furthermore, there was no inducement by Hill. She did not promise Reynolds any advantages or benefits. In fact, she promised him nothing. All Hill did was recommend that Reynolds receive counseling and warn that she could not give him advice because she might be called upon to prosecute him in the future. Hill certainly never suggested that Reynolds talk with the police. If anything, Hill's comments were a further indication to Reynolds that he could be held criminally liable for sexually abusing his daughters.[5] Without a promise of benefit or advantage, there was no inducement.

We note further that nothing Reynolds said to Hill or at the Center became evidence at his trial. Even assuming that Hill's comments were an inducement to seek counseling, what he said to Meyer or any counselor at the Family Children's Service Center was not used against him in court. The confessions at issue were made to Corporal Norman much later and were completely independent of the brief telephone conversation between Reynolds and Hill.

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5. Had Hill truly embarked on a course of offering legal advice to Reynolds that induced him to confess, she might have crossed the line into impermissible conduct. In *Martin v. Wainwright*, 770 F.2d 918, 927 (11th Cir. 1985), *modified*, 781 F.2d 185, *cert. denied*, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986), the court said it was "troubled" by allegations that an assistant state's attorney named Jack Scarola had told the suspect that a confession might be of value to him at the capital sentencing phase of his trial and that "it is only the truth that can help you." Although the court found that "[a]s a prosecuting attorney, Scarola should not have engaged in such discussions with a soon-to-be defendant," it concluded that the prosecutor's "indiscretions" did not render the confession involuntary. Nothing that Hill did even comes close to the conduct before the court in *Martin v. Wainwright*. And, of course, Scarola was involved in the interrogation of a suspect, while Hill was merely responding to an unsolicited query from someone she had never heard of.

Appendix A

In trying to link Hill's comment to his subsequent confession to Norman, Reynolds reaches a bit too far. We would have to accept that the prosecutor not only coerced or induced him into talking to the counselor at the Center, but also coerced or induced him into confessing to Corporal Norman at a later date after his counseling was well underway. Arguably, Hill may have induced Reynolds to speak to the counselors; in no way did she attempt to induce him to speak to the police. Even assuming improper conduct by the prosecutor, any taint is so attenuated by the time Corporal Norman interviewed Reynolds -- preceded by both the investigator and Meyer advising Reynolds he did not have to talk to the police -- that exclusion is not appropriate. There is no established link between the alleged inducement to talk with counselors at the Center and Reynolds' decision to speak with Corporal Norman.

Whatever the prosecutor did, Reynolds gave his first statement to Norman after having received his *Miranda* rights and being told by Meyer that he did not have to talk to police. In neither his conversation with Hill nor his interview with Norman was Reynolds under any compulsion to confess, and he was offered no inducements affecting the voluntariness of his statements. In short, nothing Assistant State's Attorney Hill did or said led Reynolds to admit his crimes to the police, whether one analyzes the evidence from a per se rule or a totality of the circumstances approach.

THE SECOND CONFESSION

The second interview, which occurred at Reynolds' home nearly two months after the initial session with Norman, is also a target of Reynolds' attack. By this time, Norman had interviewed both Crystal and Vivian and was apparently well on his way to developing a case against their father. Reynolds invited the investigator inside and agreed to talk. Norman told Reynolds that he was not going to arrest him that day and that he could stop the

interview and tell him to leave any time he wished. He did not, however, reiterate the full *Miranda* rights as he had done at the Center; he said merely that it was the "same situation down in Ms. Meyer's office."

Reynolds contends that Norman should have fully advised him of his rights before the second interview. We reject his argument and adopt the well-reasoned analysis of the Court of Special Appeals, which held that *Miranda* warnings were unnecessary because there was no custodial interrogation. 88 Md. App. at 207-213, 594 A.2d at 614-17.

Reynolds also contends that Norman improperly induced him to talk by indicating the truth would "help" Crystal. We disagree. What Norman may have implied was that the statement might be for Crystal's benefit -- not for Reynolds' benefit. At most, any reward would be a purely collateral benefit. Promises of purely collateral benefits do not generally reach a level that undermines the voluntariness of a confession.

> " '[I]n general such promises [of only 'collateral' benefits] are less coercive to the accused than promises directly relating to the criminal proceedings at hand' Some courts . . . apparently regard the collateral nature of the promised benefit unworthy of consideration or even comment." (Footnotes omitted.)

1 *McCormick* §155, at 616-17 (quoting *Miller v. Fenton*, 796 F.2d 598, 610 (3d Cir.), *cert. denied sub nom., Miller v. Neubert*, 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed.2d 587 (1986)). Generally the type of inducements that rendered confessions inadmissible at common law were inducements extreme enough to make the confessions unreliable and which directly impacted on the accused

or the crime charged. *LaFave & Israel*, §6.2, at 440.

In *Stokes v. State*, this Court suppressed a statement from a suspect who had been promised what may have been both a direct and collateral benefit -- that his wife would not be arrested and charged as a codefendant if he told the police where illicit drugs were hidden. 289 Md. at 157, 423 A.2d at 553. In that case, and in the cases cited therein, the inducements concerned what the *police* would or would not do if the defendant made a statement. It was the threat of the authorities to cause the defendant distress and anguish that created the coercive atmosphere. We added, "Neither Maryland nor any other jurisdiction of which we are aware, however, goes so far as to say that a confession motivated solely by a defendant's sense of altruism, without the inducement of an official threat or promise, is involuntary." 289 Md. at 161, 423 A.2d at 555. *See also Rogers v. State*, 89 Md. 424, 43 A. 922 (1899). In *Rogers*, a brother and sister were both being simultaneously interrogated about a homicide. The brother confessed to the murder after having been told by police "if your sister is innocent you are the only one who knows so, and it is your duty as a man to tell what you know about it . . . " 89 Md. at 426-27, 43 A. at 923. This Court upheld the admissibility of the confession because there was neither threat, promise, nor any *quid pro quo* posited by the police officer's statement.

In the instant case, Norman made no express or implied threat or promise to take official action or refrain from taking official action depending on whether Reynolds made a statement . Thus, "where no express or implied promise or threat is made by the police, a suspect's belief that his cooperation will benefit a relative will not invalidate the . . . [statement]." *Stokes v. State*, 289 Md. at 162, 423 A.2d at 555-56 (alteration in original)(quoting *People v. Steger*, 128 Cal. Rptr. 161, 168, 546 P.2d 665, 672 (Cal. 1976)(*en banc*). *See also Finke v. State*, 56 Md. App. 450, 485-86, 468 A.2d

353, 371-72 (1983), *cert. denied*, 299 Md. 425, 474 A.2d 218, *cert. denied*, 469 U.S. 1043, 105 S.Ct. 529, 83 L.Ed.2d 416 (1984).

Reynolds does not contend that Corporal Norman was untruthful when he relayed Crystal's concern that her allegations might not be believed. Merely relaying this to Reynolds was not an "improper" inducement. *See Wright v. State*, 307 Md. 552, 515 A.2d 1157 (1986) (discussing inducements and the requirement that an inducement be "improper.").

At most, Norman implied that, by confessing, Reynolds would allay Crystal's self-doubt and concern that no one would believe her. This may have triggered Reynolds' "sense of altruism," but it was not the type of inducement that would mandate suppression. There was no promise or threat of official action if Reynolds did not confess. The trial judge did not err in refusing to suppress the second confession.

CONCLUSION

In sum, we do not find that any action on the part of the prosecutor or the police investigator subverted Reynolds' freedom to decide whether or not to make his incriminating statements. What Reynolds told Norman -- and what was used eventually at his trial -- was voluntary.

JUDGEMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE PETITIONER.

Judge Eldridge concurs in result only.

APPENDIX B — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND FILED AUGUST 29, 1991

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1247

September Term, 1990

FREDERICK WILLIAM REYNOLDS, JR.

v.

STATE OF MARYLAND

Moylan,
Davis,
Getty, James S. (Specially Assigned),
JJ.

OPINION BY MOYLAND, J.

Filed: August 29, 1991

The sets of rules circumscribing the admissibility of incriminating statements are many. They are, moreover, distinct. This appeal requires us to sort them out and to look at several of them in appropriate isolation.

The appellant, Frederick William Reynolds, Jr., was convicted by a Carroll County jury, presided over by Judge Donald J. Gilmore, of 1) second-degree rape, 2) a second-degree sexual

offense, 3) assault with intent to rape, 4) assault with intent to commit a second-degree sexual offense, and 5) incest. Upon this appeal, he raises the single contention that his various incriminating admissions and confessions should have been suppressed because they were obtained in violation of the privilege against compelled self-incrimination of the Fifth Amendment and the due process clause of the Fourteenth Amendment of the Federal Constitution and of their Maryland counterparts, Articles 22 and 23 of the Maryland Declaration of Rights.

Analytically, this generic contention splits into two doctrinally distinct situations. Successive incriminating conversations over an extended period of time fell into one or the other of two categories: 1) conversations with a psychological counsellor, Marcia Meyer, at the Family Children's Service Center; and 2) subsequent conversations with Corporal Richard Norman of the Maryland State Police.

The Factual Background

The unfolding of this case did have an unusual twist. Although ample corroboration of the *corpora delicti* was produced at trial, the very occurrence of the crimes, quite aside from any evidence of criminal agency, only came to light when the appellant himself revealed them, first to a psychological counsellor and then to police authorities. The victims of the appellant's sexual abuses, perpetrated at least twelve years earlier, were his now-adult daughters, no longer living at home.

The appellant is a 56-year-old Carroll County farmer with a high school education. At a family gathering on Mother's Day, 1989, his family collectively confronted him with having sexually abused his four daughters when they were children. At his family's urging, he sought counselling, first with the family minister. His

minister, sensing the dimensions of the problem, in turn referred him to Marcia Meyer at the Family Children's Service Center in Westminster.

When the appellant, accompanied by his wife, first visited Ms. Meyer at the Westminster Center, he was told that in order to obtain counselling, he would have to sign a form consenting to the Center's notification of the police of any incriminating evidence regarding child abuse. Ms. Meyer fully advised the appellant that he was not compelled to sign the form and that he was not required to receive counselling at the Center. Ms. Meyer was complying with the command of Md. Fam. Law Code Ann. § 5-704, which requires all health practitioners, human services-workers, and counsellors, among others, to notify an appropriate law enforcement agency if they have reason to believe that a child had been subject to abuse.

Initially leery about signing the consent form, the appellant called the State's Attorney's Office for advice and spoke to Assistant State's Attorney Kathi Hill. Ms. Hill gave him no assurances that he would not be prosecuted. The prosecutor, fielding an unsolicited and unanticipated telephone call, obviously tried to be both helpful but cautiously candid, "Well, you should go and take your counseling now, that's the first thing. It's been a long time since this occurred, but I cannot give you advice because . . . it may, in the future . . . I'm a prosecutor, I prosecute these types of cases."

The appellant then decided, in the presence of his wife, to sign the consent form. He did so because "without signing that form, I could not get counseling at that place." The appellant testified that he assumed that other agencies would have a similar procedure (as was indeed the case). The appellant began a series of counseling

sessions relating to the sexual abuse of his four daughters. This collective incrimination over a series of counseling sessions was introduced at the appellant's trial and is the initial object of his present challenge.

An Ostensible Counsellor-Patient Privilege: Neither Available Nor Claimed

The appellant argues that, as a result of family pressures upon him and inherent pressures within him, he desperately needed counseling. He argues further that that need, somehow coupled with Ms. Meyers' inability to extend counseling without his signing of the waiver form, rendered his various admissions and confessions involuntary.

The appellant's reasoning in this regard is a bit blurred. In no event were his confessions themselves involuntary. By his own acknowledgement, he needed to confess and wanted to confess. The confessions were an indispensable predicate to and part of the psychological catharsis and further treatment that he so affirmatively and urgently sought. In framing the issue, the appellant appears to have things doctrinally reversed, as if viewing events in a mirror image. The threat of criminal exposure to which he objects was *not* a pressure to confess; it was the precise opposite, a *pressure not to confess*. Notwithstanding that pressure, the appellant successfully resisted it and confessed anyway. Any option that was arguably burdened was not his choice to remain silent but his choice to speak.

In reframing the complaint for the appellant, we conclude that he might have argued that what was involuntary was not the confession *per se* but rather the waiver of an ostensible counsellor-patient privilege. At most, what was involuntary was not the

confession but only the waiver of its confidentiality. The appellant, however, makes no such argument. He never sought to establish the existence of such a privilege.

Indeed, he could not have, for there is no such privilege. Save only the privilege against compelled self-incrimination, all other privileges are creatures either of the common law or of statute and are subject to legislative control. The provisions of Md. Fam. Law Code Ann. § 5-704 explicitly spell out that there is no privilege against a counsellor's legally required disclosure of the fact of child abuse to law enforcement officials.

For even more basic reasons, however, the claim of inadmissibility based upon involuntariness against Ms. Meyer and the Family Children's Service Center must fail.

No State Action

At the most fundamental level, this aspect of the appellant's argument (involuntariness of either the confession or the waiver of its confidentiality) founders upon the shoals of the fact that the Westminster Family Children's Service Center is a private facility and not a State agency. The appellant argues a violation of the Fifth Amendment privilege against compelled self-incrimination made applicable to the states through the due process clause of the Fourteenth Amendment, as well as the Maryland constitutional counterparts which have consistently been construed *in pari materia* with their federal analogues. As the modifying adjective "constitutional" necessarily implies, the constitutional law (federal or state) is concerned with the constituting of government, with spelling out those things that government may do and that government may not do. It is not a code of conduct to private individuals or private corporations. When governmental action is not involved, constitutional law is not involved.

Fully dispositive in this regard is the Supreme Court's decision in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). In that case, the defendant claimed both that a confession was involuntary and that a waiver of *Miranda* rights was involuntary. Everyone agreed that the agents of government had done nothing improper. "The Colorado trial court . . . found that the police committed no wrongful acts, and that finding has been neither challenged by the respondent nor disturbed by the Supreme Court of Colorado." 479 U.S. at 165. The coercing agent was, according to the defendant, the "Voice of God" and, according to his psychiatrist, a "command hallucination," confronting the defendant with the stark choice between confession and suicide. The defendant chose the former. In pointing out that the absence of any state action thereby rendered constitutional law inapplicable, the Supreme Court observed, at 479 U.S. 165:

> "Our 'involuntary confession' jurisprudence is entirely consistent with the settled law requiring some sort of 'state action' to support a claim of violation of the Due Process Clause of the Fourteenth Amendment."

The Fifth Amendment specifically and the Bill of Rights generally are limitations or prohibitions directed at government as government. When the Fifth Amendment provides that "No person shall be *compelled* in any criminal case to be a witness against himself," it contemplates governmental compulsion and not private compulsion. The Supreme Court went on, at 479 U.S. 165-166:

> "The difficulty with the approach of the Supreme Court of Colorado is that it fails to

> recognize the essential link between coercive activity of the State, on one hand, and a resulting confession by a defendant, on the other. The flaw in respondent's constitutional argument is that it would expand our previous line of 'voluntariness' cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision."

Even if we were to assume that the appellant's confessions were somehow involuntary (a conclusion not remotely suggested by the evidence in this case), no constitutional right would be implicated. There is no *constitutional* right not to give an involuntary confession; there is only a constitutional right not to be compelled to do so by government. The Supreme Court is again illuminating, at 479 U.S. 166:

> "Moreover, suppressing respondent's statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution . . . Only if we were to establish a brand new constitutional right — the right of a criminal defendant to confess to his crime only when totally rational and properly motivated — could respondent's present claim be sustained." (citation omitted).

Nothing we say herein should be taken to suggest that a

privately coerced, as opposed to governmentally coerced, confession could not be inadmissible but only that it would be so within a different frame of analysis. Had, hypothetically, Ms. Meyer and her companions at the Family Children's Service Center stretched the appellant upon the rack, his resultant confession might have been inadmissible but it would not have been unconstitutional.

> "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."

479 U.S. at 166. Such inadmissibility, however, would fall within the province of evidentiary law, concerned as it is with the evidentiary trustworthiness or competence of a tortured confession, and not within the province of constitutional law, concerned as it is with governmental behavior. The clear demarcation between evidentiary unreliability and constitutional impropriety was spelled out by the Supreme Court, at 479 U.S. 166-167:

> "Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent

> might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum...and not by the Due Process Clause of the Fourteenth Amendment. 'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' " (citation omitted).

There is no suggestion in this case that the confessions were in any way inherently untrustworthy or incompetent in the evidentiary sense. Certainly no claim was made in that regard.

The Introduction of State Action

The element of State action first appeared in this case on July 11, 1989. Ms. Meyers had contacted the State's Attorney's Office about the appellant's acknowledged sexual abuse of his four daughters. The State's Attorney's Office had, in turn, notified the Maryland State Police and the case was assigned to Corporal Richard E. Norman. Corporal Norman indicated to Ms. Meyers that he would like to speak with the appellant and Ms. Meyers undertook to arrange the meeting. The appellant agreed to meet with Corporal Norman at the Family Children's Service Center in the presence of Ms. Meyers. That meeting occurred on July 11, 1989.

Initially, Ms. Meyers informed the appellant that he did not have to speak to Corporal Norman if he did not wish to do so. It was only after he agreed that MS. Meyers introduced the two. Corporal Norman reiterated that the appellant did not have to talk to him and that he would leave at any time the appellant wished. The appellant

later testified that he "jokingly" asked Corporal Norman to read him his constitutional rights and that Corporal Norman did so, reading from a printed card.

Until that interview, Corporal Norman knew nothing about the offenses. It was the appellant who supplied him with the names and addresses of his daughters. The appellant further suggested that Corporal Norman contact the daughters to find out exactly what had happened.

The thrust of the appellant's complaint does not concern itself significantly with this first meeting or with the incriminating admissions made in the course of it. It is rather the second meeting, two months later on September 6, that draws the appellant's fire. During the intervening months, Corporal Norman had continued his investigation, speaking at length with two of the appellant's daughters. After interviewing one of those daughters for several hours on September 6, Corporal Norman went to the appellant's home at a little after 4 P.M. and asked to speak to him. Corporal Norman informed the appellant that since their last interview, he had spoken to two of the daughters and received their versions of the abuses. When Corporal Norman asked whether he could speak to the appellant again about these events, the appellant responded, "Fine," and invited the Corporal into his house.

Corporal Norman informed the appellant that he was not under arrest, that he did not have to talk with him, and that if the appellant wished, the Corporal would leave. This second interview was tape-recorded. The interview lasted a little over an hour. In the course of it, the appellant repeated his version of the earlier acts of abuse. At the conclusion of the interview, Corporal Norman left. The appellant was not arrested until two days later, on September 8.

Appendix B

Miranda Inapplicability:
Absence of Custody

The appellant complains that prior to this second interview at his home on September 6, Corporal Norman did not give him the *Miranda* warnings. It is unnecessary to analyze 1) the significance of those advisements that Corporal Norman did give the appellant on September 6, or 2) the significance of the fact that *Miranda* warnings, whether required or not, had been fully given the appellant prior to his first interview on July 11. The short answer with respect to the September 6 interview is that *Miranda* was inapplicable.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prescribed a set of warnings and advisements of rights that the police *under certain circumstances* are required to give to a suspect. The *Miranda* rule is not itself constitutional. The so-called *Miranda* catechism is rather a judicially devised implementing device, specifically designed to safeguard the Fifth Amendment privilege against compelled self-incrimination. *United States v. Mandujano*, 425 U.S. 564, 579, 96 S.Ct. 1768, 48 L.Ed.2d 212, 224 (1976), described precisely *Miranda*'s identity with the privilege and their combined function of negating the inherent "compulsion" of the custodial environment:

> "*Miranda* addressed extrajudicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards. *The decision expressly rested on the privilege against compulsory self-incrimination*; the prescribed warnings sought to negate the 'compulsion' thought to be inherent in police station interrogation." (emphasis supplied).

Appendix B

When, therefore, the threat of compulsion and the antidotal Fifth Amendment privilege are involved in an extrajudicial police-citizen confrontation, *Miranda*'s implementing rule is *ipso facto* involved as well. Absent that involvement of the Fifth Amendment privilege, based upon the inherent threat of compulsion, *Miranda* is self-evidently inapplicable. The scope of an implementing rule can be no broader than the scope of the undergirding constitutional protection being implemented.

The heart of the Fifth Amendment privilege is the protection of a suspect from actual governmental compulsion or coercion to incriminate oneself. To determine when the threat of governmental compulsion is at work in an investigative setting, *Miranda* announced a bright line formula that the combination of custody and interrogation will be deemed to be presumptively coercive. It is, therefore, custodial interrogation that gives rise to the presumption of compulsion and brings into play the therapeutic, implementing rule of *Miranda*. Absent the combination of both custody and interrogation, there is no presumption of compulsion and there is, therefore, no call for *Miranda*'s implementing countermeasures. Of the two necessary conditions for *Miranda* applicability, the one at issue with respect to the September 6 interview is that of custody.

"Custody" ordinarily contemplates that a suspect will be under arrest, frequently in a jailhouse or station house setting. The appellant seeks solace almost exclusively in the case of *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed. 311 (1969). There, the Supreme Court found "custody" in the setting of the suspect's boardinghouse. The circumstances were, however, so extreme as to make the case readily distinguishable. In investigating a murder, four armed police officers were admitted to Orozco's boardinghouse by an unidentified woman and then burst,

unannounced, into his bedroom at 4 A.M. He was immediately interrogated, even as he came awake. The police testified that he was "under arrest" at the moment the interrogation began. Following the interrogation, he was taken to the police station under arrest.

In countering Texas' claim that *Miranda* was not applicable because Orozco had been "interrogated on his own bed, in familiar surroundings," the Supreme Court pointed out that *Miranda* "warnings were required when the person being interrogated was 'in custody at the station *or otherwise deprived of his freedom of action in any significant way.*'" (emphasis in original).

There is nothing in the circumstances of the September 6 interrogation of the appellant at the appellant's home, during which and after which the appellant was not under arrest, that suggests that he was deprived of his freedom of action in any significant way.

Indeed, in *Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S.Ct. 3138, 82 L.Ed.2d 317, 333 (1984) the Supreme Court focused explicitly on the phrase from *Miranda* "otherwise deprived of his freedom of action in any significant way":

> "However, we decline to accord talismanic power to the phrase in the *Miranda* opinion emphasized by respondent. Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against

> self-incrimination to require that he be warned of his constitutional rights."

The *Berkemer* opinion reminded us that the custodial setting dealt with by *Miranda* — a setting severe enough to give rise to a presumption of compulsion—was one wherein a suspect was held "incommunicado" and "in a police dominated atmosphere." It then went on to point out that even a legally authorized detention or seizure of the person in the context of a traffic stop or even a *Terry* stop did not amount to custody within the contemplation of *Miranda*. Critical distinguishing factors were 1) that even the legally compelled stop would only last a little while,and then the detainee would be free to go upon his way and 2) that the stop was frequently in public or in the presence of friends and relatives and was by no means the "incommunicado" situation calling for the strong antidote of *Miranda*.

An illuminating contrast may be made between the September 6 interview of the appellant and a typical *Terry* stop-and-frisk situation. Here, the appellant was not under any restraint at all. Here, the appellant was entitled not to speak to the policeman at all. Here, the appellant was entitled to terminate the interview at any time he chose. In a stop-and-frisk situation, the detainee is not free to leave but must stand and be questioned. The detainee, moreover, may be subjected to a head-to-toe frisk for weapons. Even that far more restrictive situation, however, is not "custodial" so as to require the giving of *Miranda* warnings. *Berkemer v. McCarty* explained, at 468 U.S. 439-440:

> "[U]nless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this

> sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda.*" (footnotes omitted).

In *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), the Supreme Court was dealing with a situation where the suspect, as here, was being interrogated in a private home. The interrogators were two Special Agents of the Intelligence Division of the Internal Revenue Service. In holding that the situation was simply not custodial within the contemplation of *Miranda*, the Supreme Court reiterated the extreme and overbearing circumstances that *Miranda* was designed to counteract:

> "The Court concluded that compulsion is 'inherent in custodial surroundings, . . . and, consequently, that special safeguards were required in the case of 'incommunicado interrogation of individuals in a police-dominated atmosphere.' " (footnote and citations omitted).

425 U.S. at 345-346. The Court rejected Beckwith's claim that his stressful situation was somehow the functional equivalent of the custodial setting:

> "Petitioner's argument that he was placed in the functional, and, therefore, legal, equivalent of the *Miranda* situation asks us now to ignore completely that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of...in-custody interrogation.'"

325 U.S. at 346. The Supreme Court further pointed out that the fact that the police have a strong case against the suspect and that the suspect is the "focus" of the investigation does not transform a non-custodial setting into a custodial one:

> "An interview with Government agents in a situation such as the one shown by this record simply does not present the elements which the *Miranda* Court found so inherently coercive as to require its holding. Although the 'focus' of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding."

425 U.S. at 347.

In *Oregon v, Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), a burglary suspect was actually invited to come to the police station, where he sat across a desk from his interrogator behind closed doors. The police interrogator, moreover, falsely stated that the suspect's fingerprints had been found at the burglary scene. At the end of the interrogation, however, the suspect was not arrested and was released. The Oregon supreme Court reversed a subsequent conviction, holding that "the interrogation took place in a coercive environment of the sort to which *Miranda* was intended to apply. The Supreme Court of the United States reversed, holding that the situation was non-custodial:

> "[T]here is no indication that the questioning took place in a context where respondent's

> freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2 hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody 'or otherwise deprived of his freedom of action in any significant way.' "

429 U.S. at 495. The Supreme Court further explained that the stress, guilt and anxiety inherent in every situation where a suspect is being interrogated by those who believe him guilty of crime does not add up to the functional equivalent of compulsion represented by custodial interrogation:

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question."

429 U.S. at 495.

A compulsory summons to appear and to testify before a grand jury is far more coercive than the home interview conducted in this case. Even with respect to that degree of compulsion, however, *United States v. Mandujano*, 425 U.S. 564, 580, 96 S.Ct. 1768, 48 L.Ed-2d 212, 224 (1976), made it clear that that was not custodial within the contemplation of *Miranda* and that *Miranda* was aimed at pressures of a far more daunting and quite different quality:

Appendix B

> "Indeed, the Court's opinion in *Miranda* reveals a focus on what was seen by the Court as police 'coercion' derived from 'factual studies [relating to] police violence and the "third degree" . . . physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions . . . ' . . . To extend these concepts to questioning before a grand jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in *Miranda*." (citations omitted).

For a thorough review of many of the various factors that bear upon the issue of custody, *see Cummings v. State*, 27 Md~App. 361, 369-381, 341 A.2d 294 (1975).

The September 6 interview by Corporal Norman of the appellant at the appellant's home was not remotely custodial in nature. *Miranda*, under the circumstances, was completely inapplicable.

Due Process:
Pre-Miranda Voluntariness

In conducting a dogged defense in depth, the appellant argues additionally that even if *Miranda* and the Fifth Amendment privilege were not violated, there was nonetheless a violation of general due process under the pre-Miranda regime of involuntariness;. The appellant's effort is flawed in two respects.

Appendix B

A. The General Flaw:

At the more general level, the appellant invites us to employ a frame of analysis that was essentially replaced by the Supreme court 25 years ago in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as being too cumbersome and time-consuming. In 1936, *Brown v. Mississippi,* 297 U.s. 278, 56 S.Ct. 461, 80 L.Ed. 682, reviewed for the first time the constitutionality of a challenged confession coming out of a state court. It did so under the due process clause of the Fourteenth Amendment. Between then and 1964[1] it considered approximately 35 state confession cases, placing exclusive reliance on the due process clause. What emerged was the so-called "voluntariness" test, which found ultimate expression in *Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037, 1057-1058 (1961):

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

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1. Within a year after Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963) incorporated the Sixth Amendment right to counsel into the due process clause, Escobedo v. Illinois added a right-to-counsel violation to the arsenal of constitutional challenges to the admissibility of confessions. The limited utility of that weapon, however, is that it, like all Sixth Amendment rights, is available only to one who has achieved the status of being "the accused."

That development paralleled developments in the federal courts. Whereas the criterion for determining inadmissibility in a state trial was involuntariness within the contemplation of the due process clause, the counterpoint criterion for determining inadmissibility in a federal trial was compulsion within the contemplation of the Fifth Amendment privilege. *Bram v. United States,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed.2d 568 (1897).

A doctrinal marriage was made in 1964 when the Supreme Court overturned half a century of precedents and held that the Fifth Amendment privilege was incorporated into the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Although *Malloy v. Hogan* did not itself deal with a confession, it supported its incorporation argument by pointing out that a large part of the Fifth Amendment privilege, that prohibiting compelled confessions, was already applicable to the states by virtue of the Fourteenth Amendment's ban upon involuntary confessions:

> "[T]oday the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram v. United States*...the Court held that '[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself." ' " (citation omitted).

378 U.S. at 7. It was clear that a compelled confession according to the Fifth Amendment and an involuntary confession according to the Fourteenth Amendment were one and the same:

> "Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary.'. . . In other words the person must not have been compelled to incriminate himself." (citations omitted).

378 U.S. at 7.

At the next available opportunity following the doctrinal marriage, *Miranda v. Arizona* moved the great bulk of constitutional confession law under the Fifth Amendment umbrella. At the most basic level, *Miranda* accomplished two things. The testimonial privilege, long a familiar fixture in the courthouse, had been massively moved out to the station house. Whereas the implementation of that privilege had been a comfortable tradition in the courthouse, with lawyers and judges and clerks and 200 years of precedent habituated to their implementing roles, implementation in the strange, new setting was problematic. Without the familiar cast of implementing personnel on hand at the station house, it fell to the lot of *Miranda* to perform their role in the new and untraditional locale.

In the course of implementing the privilege, *Miranda* served a second function as well. It was deliberately designed to substitute a quick and efficient litmus paper test for what had become an interminable adjudicative nightmare. In either the linguistic tradition of involuntariness or the indistinguishable linguistic

tradition of compulsion, the state of the confessor's mind had been assessed according to the totality of the circumstances. That totality approach committed the suppression hearing judge to the seemingly endless consideration of age, I.Q., competence, sanity, psychological makeup, childhood, prior criminal experience, giving or withholding of warnings, state of custody, availability of visitors, access to telephone, place and duration of interrogation, *et cetera ad infinitum*. *Miranda* sought to curtail that time-consuming exercise by giving a defendant the benefit of a bright line formula. The simple establishment of custody and interrogation would give rise to the presumption of compulsion (for Fifth or Fourteenth Amendment purposes) and require the therapeutic benefits of the *Miranda* catechism. *Miranda* made it easier to prove compulsion or involuntariness, not more difficult.

To the extent to which *Miranda*'s custodial interrogation and traditional involuntariness are not coterminous concerns, traditional involuntariness invariably contemplates a degree of malevolence and coercive influence that goes beyond the presumptive coercion of custodial interrogation, not something that falls short of it. Thus, for instance, a violation of only *Miranda*'s implementing rule — a "mere *Miranda*" violation — although calling for the suppression of the confession on the merits of guilt or innocence, does not trigger second-level suppression under the "fruit of the poisonous tree" doctrine. *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), or preclude the use of the Miranda-violative statement for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). When the unconstitutional cut, on the other hand, goes deep enough to touch the raw central nerve of the undergirding constitutional guarantee itself, the offending

statement may not be used for any purpose at all. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). *And see Kidd v. State*, 33 Md.App. 445, 366 A.2d 761 (1976); *State v. Kidd*, 281 Md. 32, 375 A.2d 1105 (1977).

What the appellant here seeks to do is to take that relationship between the greater fault (involuntariness) and the lesser fault (a *Miranda* violation) and to turn it inside out. From several unexceptionable precedents establishing that an instance of true involuntariness may be more grievous than a *Miranda* violation, he leaps to the opposite conclusion that there may be instances of involuntariness not amounting to a *Miranda* violation. While that may be possible, that coercion or inducement can occur after the *Miranda* procedure is completed, there is no indication of that occurring here.

The appellant invites us to abandon the "bright line" virtues of *Miranda*'s easily administered test and to return to the interminable adjudicative nightmare of the pre-Miranda "totality of circumstances" regime. This would undo, in major measure, the uniformity and the administrative efficiency that *Miranda* was designed to accomplish and has accomplished. For reasons of policy alone, the appellant's invitation must be declined.

B. The Specific Flaw:

Even if we were to accept, however, the appellant's invitation to assess voluntariness under circumstances not amounting to a *Miranda* violation, the exercise would yield the appellant nothing.

In constructing his argument in this regard, the appellant has culled, highly selectively, isolated sentences and phrases from four or five pre-*Miranda*, voluntariness cases and artfully woven them together so as apparently to cover his situation *vis-a-vis* Ms. Meyer

and Corporal Norman "There is torture of mind as well as body; the will is as much affected by fear as by force," *Payne v. Arkansas,* 356 U.S. 559, 566, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); "[N]either the body nor mind of an accused may be twisted until he breaks," *Culombe v. Connecticut,* 367 U.S. 568, 584, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); "[T]he product of coercion, either physical or psychological cannot stand," *Rogers v. Richmond,* 365 U.S. 534, 540, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); "[T]he blood of an accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama,* 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1959).

Far from establishing instances of involuntariness under circumstances less coercive than *Miranda's* custodial interrogation, each of these cases involves the very danger of custodial interrogation that *Miranda* was designed to counter. In *Payne v. Arkansas*, a 19-year-old with a fifth-grade education was held incommunicado for over 48 hours, without counsel and without permission to make a telephone call, and was warned by the Chief of Police that a potential lynch mob of thirty to forty people was gathering outside and that the Chief's protective intervention was contingent upon the suspect's confessing. In *Culombe v. Connecticut,* the suspect, in police custody, was accosted by teams of interrogating officers over a period of ten days. In *Rogers v. Richmond*, the suspect was transported from the jail to the State's Attorney's Office, was interrogated by a team of three policemen for approximately nine hours, and was threatened that his wife would be arrested if he did not confess. In *Blackburn v. Alabama,* the suspect, under arrest, was interrogated by three policemen for between eight and nine hours in closely confined quarters—a room measuring, at most, six feet by eight feet.

Had the interrogations in these cases taken place after 1966, they would have represented clear-cut violations of *Miranda v*

Arizona. It is, therefore, impossible to cite them, as the appellant does, for the proposition that the appellant's non-custodial, non-Miranda-violative interview with Corporal Norman nonetheless overbore his will to resist. Clearly, the circumstances of the appellant's home interview in this case do not come close to establishing that his incriminating statements were involuntary within the traditional contemplation of the due process clause.

Maryland Violations

The appellant now claims, for the first time on appeal, that the introduction of his incriminating statements violated, *inter alia,* Articles 22 and 24 of the Maryland Declaration of Rights. At the outset, we will assume that his second constitutional citation is meant to be to Article 23, dealing with due process of law, and not to Article 24, dealing with slavery. The appellant also claims a violation of the Maryland common law.

Quite aside from the fact that Articles 22 and 23 are *in pari materia* with their respective federal counterparts, the Fifth Amendment privilege against compelled self-incrimination and the Fourteenth Amendment guarantee of due process of law, the short answer is that nothing in this regard was ever raised before the trial court. No mention of alleged violations of Maryland law was made in the course of the suppression hearing and the suppression judge, therefore, was never called upon to make a ruling in that regard.

The Motion to Suppress itself was an omnibus motion dealing with search and seizure issues, with confessions, and with pretrial identification. The total content of the Motion with respect to confessions was:

Appendix B

> "2. That all admissions, statements, or confessions of the defendant be suppressed because they were obtained unlawfully, involuntarily, forcibly, and in violation of the defendants Constitutional and other legal rights."

Stapled to the Motion was a single page entitled "Points and Authorities." It listed the following:

> "*U.S. Constitution*
>
> *Maryland Declaration of Rights,*"

without any more specific citation to any section of either document. It then catalogued 38 cases, federal and state, covering a range of constitutional topics, embracing somewhat over 800 pages of case law, focusing on none of those 800 or more pages in particular and referring to no specific principle of law covered by any of those 38 opinions.

The suppression hearing judge was not called upon, by the most strained analysis or attenuated reasoning, to render any decision with respect to either Article 22 or Article 23 of the Maryland Declaration of Rights or with respect to Maryland common law. Presiding over the suppression hearing was Judge Raymond E. Beck, Jr. At the end of that hearing, Judge Beck ruled that the various incriminating statements were admissible in evidence.

At the outset of the trial on the merits before Judge Gilmore, the appellant never sought to have the suppression issue reconsidered or relitigated. When Corporal Norman introduced the

tape recording of his September 6 interview with the appellant, no defense objection was made.

It was only at the end of the entire case, as the appellant was moving for a judgment of acquittal, that he entered into a rambling and undifferentiated rehash of Judge Beck's failure to suppress the statements, of the failure of the court to dismiss the indictments, and of the failure of the court to rule that the two daughter-victims should not have been allowed to testify. It was in the course of this ramble that a passing allusion was first made to Maryland law. Quite aside from other inadequacies, it came too late. There was never any suggestion that Judge Gilmore was opening those issues up for reconsideration at that late hour. He simply announced, with some resignation, "All of your motions are denied." We do not deem the appellant's eleventh-hour allusions or references to long settled issues to be an adequate revival or preservation of them for appellate review.

JUDGMENTS AFFIRMED:

COSTS TO BE PAID BY APPELLANT.

APPENDIX C — OPINION OF CIRCUIT COURT FOR CARROLL COUNTY, MARYLAND, FEBRUARY 27, 1990

THE COURT: Well, when the events of the past came to light in 1989, apparently sometime in June, perhaps prior to June, the — Mr. Reynolds was referred or somehow got to pastoral counseling and, although it didn't come out in testimony today, other than that the pastor was too busy to continue to counsel with him, now,there's a situation where counseling would have been privileged. Without Mr. Reynolds waiver, the pastor could not have disclosed any information like the psychiatrist and priests and other types of privileges.

However, when he was referred by the pastor who knew something about the facts of the case to the State's services, State — Children and Family Counseling, and when the interviewer learned the thrust of the nature of the problems,she produced the waiver indicating clearly to Mr. Reynolds that anything that was divulged of a possible incriminating nature would be referred to authorities. Now, I don't know that — Mr. Reynolds says that she wasn't — she didn't give him options and he was — he was wanted counseling — he wanted counseling; in fact, said he was desperate for counseling even though the events hadn't occurred for some thirteen years, according to his testimony and, apparently, they had come to light and the gentleman wanted counseling, and the Court doesn't know what kind of options were given him other than he couldn't get counseling there unless he signed a waiver; that's not to say that he couldn't seek counseling back with the pastor or with a psychiatrist or psychologist where communications would have been privileged. In any event, he signed the waiver and within a relatively short period of time, the — Mrs. Meyers — Marcia Meyers advised him that the State Police wanted to meet with him.

Now, the Court feels that Mr. Reynolds, who has a twelfth

grade education, is articulate; he may have been emotionally controlled at that point in time, but certainly knows that a new dimension entered the case at that point. He was for counseling and then suddenly the State Police are injected into the case and he was given some options about: Would he like to meet? If so, where; suggested that the meeting take place at the office of Ms. Meyers and, of course, it was subsequently arranged.

Upon the police arriving at the office that day, it was not a custodial in — interrogation within the meaning of the term "custody", as the Court understands it, was told, at least once, Court's recollection several times that he didn't have to speak with the officer and could leave any time that he wanted to or the officer would leave or, in the course of the questioning, could refuse to answer or stop and — and then Mr. Reynolds said, jokingly, that — or at least lightly, if not jokingly, "Don't I have some rights?" And, the trooper then testifies that he uses his card to give specifically the warning set forth in the Miranda and cases that follow Miranda and, again, I believe that the Defendant may have asked for that; maybe the trooper should have, as a matter of course, given him those Miranda rights, but in any event, there was no question that it had took place at that point until Miranda rights were read.

And, an interview was — was held and although a recording machine was an attempt that didn't work, several notes were taken and the trooper testified from his notes as to what was said at that time. Then with regard to any gaps that might need to be filled in, the — Mr. Reynolds suggested that his daughters be contacted, that — and provided the officer with information as to who and where and so forth, and then a couple of months passed until Corporal Norman was able to contact Crystal and Vivian. I'm not sure of the exact sequence, but apparently a phone call on September 6 — 6th to Crystal where some information was

confirmed, new information was developed, and trooper returned to the — or went to the first time — for the first time to Mr. Reynolds' home, waited for him, once again told him he was not under arrest, the investigation was continuing, he had contacted his daughter, as the Defendant had suggested, got some additional information, said he didn't want to talk about it and, again, said that he would stop anytime he wanted to and leave, and the Defendant told a long and somewhat sad story confirming, and in some cases clarifying, in others, and not remembering in other cases what had, in fact, taken place between he and Crystal, Vivian, Marian and Susan; it wasn't a very pretty picture that was painted.

But, the Court can't find that any of the statements that were given by the Defendant were under duress or while the Defendant was under any type of custodial interrogation. I suppose the biggest surprise, as stated by the Defendant, is that he was seeking counseling and didn't think that family members would testify against him or at least appear as witnesses against him. But, what he felt or thought, notwithstanding, I — I don't have a problem of constitutional proportions with regard to the — the statement or statements. I think that they were clearly voluntary on the part of the Defendant, there was no coercion and, therefore, I must do — deny your Motion to Suppress.

MS. HILL: Thank you.

MR. BOUREXIS: Thank you, Your Honor.

(The hearing concluded at 6:20 p.m.)